Tan Jiak Chye v Tan Toh Hua & Anor

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24–339 OF 2002
SU GEOK YIAM JC
25 NOVEMBER 2002

Civil Procedure *— Administration of estates — Leave to begin proceedings against receiver appointed by court — Whether application should be made to the court that appointed the defendants as receivers — Whether it would cause serious prejudice if the application is made to a court different from the one that originally appointed the receiver*

The plaintiff was the administrator of the estate of one Chor Phaik Har, deceased. The estate of Chor Phaik Har, deceased, was at all material times a beneficiary of the estate of Chor Bar Say @ Chor Bah Say, deceased. There were six other beneficiaries. The estate of Chor Bar Say @ Chor Bah Say was at all material times the beneficial owner of a $^3/_4$ undivided share in the 62 lots of land commonly known as the 'Ayer Itam Estate'. The remaining $^1/_4$ undivided share was owned beneficially by Choong Lye Hock Estate Sdn Bhd, the registered proprietor of the Ayer Itam Estate. By an order of court dated 1 March 1985 made in the Penang High Court ('the original suit'), the defendants were appointed, jointly and severally, as receivers and managers of both the Ayer Itam Estate and the estate of Chor Bar Say @ Chor Bah Say, deceased. This was an application for leave vide an originating summons by the plaintiff to institute proceedings against the defendants on the grounds of alleged neglect and misconduct.

Held, dismissing the application:

(1) Since the defendants were appointed as receivers and managers in the original suit, the plaintiff should have applied vide a summons in chambers in the original suit for leave to institute the proposed proceedings against the defendants in their capacity as court appointed receivers and managers (see p 170E–F).

(2) These proceedings were in the nature of a leave application and concerned alleged acts, omissions and misconduct of the defendants as receivers and managers and the circumstances surrounding their appointment and the duties imposed upon them by the court in the original suit. In the light of that, the argument that the court was functus officio in the original suit had no merits. In view of the nature of the allegations which have been levelled against the receivers in the draft writ of summons and statement of claim, this court was further of the view that the plaintiffs and the other defendants in the original suit should be joined as parties in the leave application in order to avoid multiplicity of proceedings (see pp 170I–171B).

(3) Despite having heard arguments on the merits of the leave application, this court was precluded from going into the merits of the leave application at this stage since the obtaining of leave is

A a condition precedent to the commencement of proceedings against the defendants. The issue on merits could only be addressed by the court which had the jurisdiction to grant the leave in the first place (see p 173F–G).

(4) It would cause serious prejudice and injustice to the defendants
B who were the receivers and managers appointed by the court in the original suit to discharge specific duties prescribed by the orders if they have to be put to considerable cost and expense just because the plaintiff had chosen to obtain leave of the court which is a court different from the one which originally appointed them (see p 177B–C).

C

[Bahasa Malaysia summary

Plaintif merupakan pentadbir harta pusaka Chor Phaik Har, si mati. Harta pusaka Chor Phaik Har, si mati, merupakan, pada semua masa
D matan, benefisiari harta pusaka Chor Bar Say @ Chor Bah Say, si mati. Terdapat enam orang benefisiari yang lain. Harta Pusaka Chor Bar Say @ Chor Bah Say merupakan, pada semua masa matan, pemunya benefisial ¾ bahagian tanah yang tidak dibahagikan di dalam 62 lot tanah yang dikenali sebagai 'Ayer Itam Estate'. Satu perempat bahagian yang tidak dibahagikan yang tinggal dipunyai
E secara benefisial oleh Choong Lye Hock Estate Sdn Bhd, tuan punya berdaftar Ayer Itam Estate. Melalui suatu perintah mahkamah bertarikh 1 Mac 1985 yang dibuat di Mahkamah Tinggi Pulau Pinang ('guaman asal'), defendan-defendan telah dilantik, secara bersama, sebagai penerima-penerima dan pengurus-pengurus kepada Ayer Itam Estate dan harta pusaka Chor Bar Say @ Chor Bah Say, si mati.
F Ini merupakan permohonan plaintif untuk kebenaran melalui satu saman pemula untuk memulakan prosiding terhadap defendan-defendan di atas alasan-alasan abai dan salah laku.

Diputuskan, menolak permohonan tersebut:

G (1) Memandangkan bahawa defendan-defendan dilantik sebagai penerima-penerima dan pengurus-pengurus di dalam guaman asal, plaintif patut memohon melalui saman dalam kamar di dalam guaman asal untuk kebenaran untuk memulakan prosiding yang dicadangkan terhadap defendan-defendan di dalam tugas
H mereka sebagai penerima-penerima dan pengurus-pengurus yang dilantik oleh mahkamah (lihat ms 170E–F).

(2) Prosiding-prosiding ini bersifat permohonan untuk kebenaran dan telah melibatkan kelakuan-kelakuan, peninggalan-peninggalan dan salah laku defendan-defendan sebagai penerima-penerima dan pengurus-pengurus dan keadaan yang mengelilingi
I perlantikan mereka dan kewajipan-kewajipan yang dipertanggungjawabkan ke atas mereka oleh mahkamah di dalam guaman asal. Oleh yang demikian, pernyataan bahawa mahkamah

adalah functus officio di dalam guaman asal tidak bermerit. Memandangkan sifat pengataan yang telah dibuat terhadap penerima-penerima di dalam deraf writ saman dan pernyataan tuntutan, mahkamah ini berpendapat bahawa plaintif-plaintif dan defendan-defendan lain di dalam guaman asal patut digabungkan sebagai parti-parti di dalam permohonan untuk kebenaran ini untuk mengelakkan kepelbagaian prosiding (lihat ms 170I–171B).

(3) Walaupun mahkamah ini telah mendengar hujah-hujah mengenai merit-merit permohonan untuk kebenaran, mahkamah ini dihalang daripada menimbangkan merit-merit permohonan untuk kebenaran pada tahap ini kerana perolehan kebenaran merupakan pra syarat kepada permulaan prosiding-prosiding terhadap defendan-defendan. Isu merit hanya dapat dipertimbangkan oleh mahkamah yang mempunyai bidang kuasa untuk memberi kebenaran (lihat ms 173F–G).

(4) Ia akan menyebabkan prejudis yang serius dan ketidakadilan kepada defendan-defendan yang merupakan penerima-penerima dan pengurus-pengurus yang dilantik oleh mahkamah di dalam guaman asal untuk melaksanakan tugas-tugas tertentu yang diperuntukkan oleh perintah-perintah tersebut jikalau mereka akan dibebankan dengan kos yang tinggi hanya kerana plaintif telah memilih untuk mendapatkan kebenaran mahkamah yang merupakan mahkamah yang lain daripada mahkamah yang melantik defendan-defendan tersebut (lihat ms 177B–C).

[*Editorial Note*: The plaintiff has filed an appeal vide Notice of Appeal No P–02–890–2002.]

Notes

For cases on leave to begin proceedings against receiver appointed by court, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue), para 189.

Cases referred to

Barrel Enterprises & Ors, re [1972] 3 All ER 631 (refd)

Datuk Hussain bin Mohamed v First Malaysia Finance Bhd (Bank Negara Malaysia, Intervener) [1990] 1 MLJ 369 (refd)

Harrison's Share Under a Settlement, re [1955] 1 Ch 260 (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57 (refd)

Ladd v Marshall [1954] 3 All ER 745 (refd)

Lee Choo Yam Holdings Sdn Bhd & Ors v Khoo Yoke Wah & Ors (Tai Kwong Goldsmith & Jewellers (under receivership); Saheran & Woon & Ors, Interveners) [1993] 3 MLJ 615 (refd)

Maidstone Palace of Varieties, Limited, Re; Blair v Maidstone Palace of Varieties, Limited [1909] 2 Ch 283 (refd)

Marriage of R T & B J Blamey, In the (1994) 18 Fam LR 481 (refd)

Potter, re, ex p Day (1883) 48 LT 912 (refd)
Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors [1995] 1 MLJ 1 (refd)
Searle v Choat (1884) 25 Ch D 723 (refd)
Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd [1984] 1 MLJ 286 (refd)
Tsoi Ping Kwan v Loh Lai Ngoh & Anor [1997] 3 MLJ 165 (refd)
William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor [1991] 2 MLJ 555 (refd)

Legislation referred to

Rules of the High Court 1980 O 21 r 3

Dato' N Chandran (*Christina Siew* with him) (*Lim Kean Siew & Co*) for the plaintiff.

Ramsun Ho (*See, Ramsun & Tan*) for the defendants.

Su Geok Yiam JC: This is an application for leave vide an originating summons (encl 2) by the plaintiff to institute proceedings against the defendants who are receivers and managers on the grounds of alleged neglect and misconduct.

The plaintiff's first application for leave

The application filed on 19 February 2002 is supported by the plaintiff's affidavit (encl 1) affirmed on a date not specified in the month of February 2002.

On 18 March 2002, the defendants entered their appearance through their solicitors, Messrs Ghazi & Lim.

On 1 July 2002, the defendants filed an affidavit in reply (encl 6) affirmed by the second defendant on 29 June 2002.

On 9 July 2002, the plaintiff filed an affidavit in reply (encl 7) affirmed on 9 July 2002.

Facts and background

The undisputed facts which are facts pertinent to this application are as follows.

The plaintiff is the administrator of the estate of one Chor Phaik Har, deceased, appointed vide grant of letters of administration dated 6 October 1998 under Petition No 31–336–1998. The estate of Chor Phaik Har, deceased, is at all material times a beneficiary of the estate of Chor Bar Say @ Chor Bah Say, deceased, to the extent of a $^{2}/_{21}$ undivided share. There are six other beneficiaries whose names need not be mentioned here except for that of Oh Kee Lee @ Oh Phaik Sim who holds a $^{1}/_{3}$ undivided share and Chor Phaik Gnor who holds a $^{2}/_{21}$ undivided share because their connection will subsequently become clear. The estate of Chor Bar Say @ Chor Bah Say is at all material times the beneficial owner of a $^{3}/_{4}$ undivided share in

the 62 lots of land commonly known as the 'Ayer Itam Estate'. The remaining $^{1}/_{4}$ undivided share is owned beneficially by Choong Lye Hock Estate Sdn Bhd, the registered proprietor of the Ayer Itam Estate.

By virtue of the estate of Chor Bar Say @ Chor Bah Say, deceased, having a $^{3}/_{4}$ undivided share in the Ayer Itam Estate, the estate of Chor Phaik Har, deceased, has a $^{4}/_{56}$ or 7.1428571% undivided share in the Ayer Itam Estate. Apart from the beneficial interest in the Ayer Itam Estate, the estate of Chor Bar Say @ Chor Bah Say also owns other lands which I shall refer to collectively as the Penang Hill lands.

The original suit and the 1985 order

By an order of court dated 1 March 1985 (as amended vide a subsequent order of court dated 1 November 1985) made in Penang High Court Civil Suit No 315 of 1983 ('the original suit'), the defendants were appointed, jointly and severally, as receivers and managers of both the Ayer Itam Estate and the estate of Chor Bar Say @ Chor Bah Say, deceased, ('the said Estates'). The order of court dated 1 March 1985 by Edgar Joseph Jr J (as his Lordship then was) expressly ordered the defendants to take over possession of all lands belonging to the said Estates as set out in Schs I and II of the order and to receive the profits and rents accruing to the said lands and to manage the said lands. It was further ordered that the hearing of all necessary and proper directions be adjourned to 8 March 1985. On 8 March 1985, the learned judge, having heard the application of the plaintiff in the original suit for directions, ordered and directed as follows:

(i) that such of the defendants as have possession do within 60 days lodge in court all titles deeds, books, documents and papers whatsoever relating to the property and business of the Ayer Itam Estate and the estate of Chor Bah Say, deceased, respectively, as hereinafter directed;

(ii) that the tenants of the said lands are to attorn and pay their growing rents and the rents in arrears to the said receivers so long as they shall continue to be such receivers;

(iii) that the said receivers do within 30 days hereof give security by a joint and several personal undertaking with one surety in the sum of RM10,000;

(iv) that the said receivers do pass their accounts within three months of commencing to act as receivers and thereafter from quarter to quarter, and to pay any balances shown therein into court to the credit of this action;

(v) that the title deeds, books, documents and papers referred to in the first direction herein be deposited in court within 60 days from the date of this order with liberty to the said receivers to inspect and take copies upon a 24 hour notice to the first defendant's solicitor that they intend to do so.

It was also further ordered that the parties shall have liberty to apply including the question of numeration.

The plaintiffs in the original suit are Oh Phaik Lin, Chor Saw Oon and Khoo Kay Hoe, the trustees of the estate of Oh Kee Lee @ Oh Phaik Sim,

deceased. The defendants in the original suit are Choong Lye Hock Estate Sdn Bhd, Chor Phaik Gnor and Chor Phaik Har.

Owing to a dispute involving the partnership business and property known as Otaheitte Estate (later called the Ayer Itam Estate), the original suit was instituted by the partners and beneficiaries of the partnership business.

On 18 May 1984, the court in the original suit granted an interlocutory injunction restraining the defendants in the original suit from managing or dealing with the assets and affairs of the estate of Chor Bar Say @ Chor Bah Say, deceased, or from interfering in any way with the affairs of the estate.

As a result of the interlocutory injunction, the defendants in the instant case were appointed until further order as receivers and managers to preserve the partnership and property.

On 29 August 1991, the second and third plaintiffs applied for the discharge of the receivers and managers subject to certain conditions and for leave to discontinue the action under O 21 r 3 of the Rules of the High Court 1980 ('the RHC') with no order as to costs in respect of the first and second defendants and with liberty to the third defendant to have her costs taxed.

The 1991 order

On 7 September 1991, the learned judge ordered, inter alia, as follows:

(1) the receivers and managers to furnish to the parties (in the original suit) a final and complete statement of accounts within two months from the date of the order and if the accounts are not agreed upon by the parties, the accounts are to be referred to the senior assistant registrar with liberty to the parties to falsify and surcharge the accounts with all usual and consequential directions and with liberty to apply;

(2) the receivers and managers to pay to the estate of Chor Bah Say, deceased, and the first defendant the balance which may be due from the receivers and managers as may be directed upon the taking of such accounts by the senior assistant registrar;

(3) if there is nothing due from the receivers and managers, the guarantee provided by the receivers and managers and their surety dated 12 March 1985 shall be discharged and released;

(4) thereupon the receivers and managers shall forthwith deliver up to the first defendant all deeds, documents, books and papers in his possession and belonging to the estate of Chor Bah Say, deceased, and the Ayer Itam Estate;

(5) upon the completion of the inquiry into the accounts, if any, and the delivery of the property (including funds) and documents by the receivers and managers, the defendants are to pay the remuneration of the receivers and managers for the period from the date of the appointment until the date of the order, the quantum of which is to be

agreed upon between the plaintiffs and the receivers and managers and if not so agreed, to be determined by the senior assistant registrar; and

(6) the plaintiffs are given the liberty to discontinue the original suit pursuant to O 21 r 3 of the RHC on terms that:

(a) the plaintiffs are deprived of their right to bring a fresh action in order to give effect to the doctrine of res judicata;

(b) the plaintiffs pay to the third defendant the taxed costs;

(c) the senior assistant registrar holds an inquiry to determine what damage (if any) was suffered by the third defendant by reason of the interim injunction which the plaintiffs, according to their undertaking, ought to pay, and finally that there be no order on the plaintiffs' summons in chambers seeking, inter alia, to fix the remuneration of the receivers and managers, and on the receivers and managers' summons in chambers seeking their discharge.

The disputed facts in this application are firstly, whether the original suit has been discontinued or is still pending and secondly, whether the receivers and managers for the said Estates have sent the final accounts to the plaintiffs in the original suit.

According to the plaintiff, the original suit has been discontinued. According to the receivers and managers, although the original suit has been discontinued as between the plaintiffs and the defendants in the original suit, it is still subsisting as between the plaintiffs and the defendants and the receivers and managers because the latter have not been discharged.

According to the receivers and managers, by a letter dated 8 November 1991, their solicitors, Messrs Zainal Azahar & Co, served the final accounts which were prepared by their accountant, Messrs Arthur Anderson & Co, for the said Estates on the solicitors for the plaintiffs and defendants in the original suit for their approval, including Messrs Bala Sundram & Co, the solicitors for the third defendant who is the plaintiff in these proceedings. By a letter dated 15 March 1993, Messrs Ghazi & Lim, the new solicitors for the receivers and managers, again wrote to the solicitors of the plaintiffs and defendants in the original suit to seek their approval for the final accounts, failing which the accounts would be referred to the senior assistant registrar for her decision. According to the plaintiff, he did not receive the final accounts.

The court shall not go further into the background of the matter except to state that up until the date of the hearing of the plaintiff's application for leave to institute proceedings against the receivers and managers, the final accounts and the remuneration of the receivers and managers had not been finalized and the receivers and managers had not been discharged.

The grounds of the plaintiff's application are that the defendants have failed and/or neglected to carry out and/or satisfactorily carry out their duties as receivers and managers of the said Estates.

A The plaintiff contends that the poor state of the finances of the Ayer Itam Estate was brought about by the acts, omissions and misdeeds of the defendants which amounted to a failure on the defendants' part to discharge their duties in the manner particularized in the draft statement of claim.

In para 12 of the plaintiff's supporting affidavit, the plaintiff made B several complaints against the defendants concerning the discharge of their duties as receivers. In particular, sub-para (10) refers to the transfer and subsequent registration of approximately 54% of the undivided share in the 58 out of the 62 lots of land in the Ayer Itam Estate to one Gerak Indera Sdn Bhd ('Gerak Indera Sdn Bhd'), and sub-para (11) refers to the creation of a charge on 10 July 2001 by the said Gerak Indera Sdn Bhd in favour of C one Magnum Enterprise on 31 October 2001 and the subsequent entry of a caveat by Magnum Enterprise in respect of the land.

In para 17 of the plaintiff's supporting affidavit, the plaintiff states that the said Chor Phaik Har, deceased, together with one Chor Phaik Sim, deceased, and Chan Wan Kee @ Charlie Chan, deceased, were appointed D trustees of the estate of Chor Bar Say @ Chor Bah Say, deceased, ('the said Trustees') by an order of court dated 30 October 1990 in Penang High Court Originating Summons No 24–721–90.

In para 18, the plaintiff alleges that notwithstanding their appointment, the said Trustees were unable to perform their duties and/or exercise their powers as Trustees by reason of the appointment of the defendants as E receivers and managers of the said Estates and the defendants' express exertion of their powers and authority over the said Estates.

In para 19, the plaintiff states that there is a pending suit, ie, Penang High Court Civil Suit No 22–371–1997 ('the 1997 Suit') against him in his capacity as administrator of the estate of Oh Kee Lee @ Oh Phaik Sim, F deceased, for inter alia, breach of duty and trust pertaining to the estate of Chor Bar Say @ Chor Bah Say, deceased, for the period between 30 October 1990 and 19 May 1995, during which period the estate was and still is under the care, control and management of the defendants.

In para 20, the plaintiff alleges that it was the defendants' failure and/or G neglect in managing the estate of Chor Bar Say @ Chor Bah Say, deceased, during the relevant period that had caused the plaintiff to be subjected to the claim in the 1997 Suit.

In para 21, the plaintiff alleges that he has been put to considerable time and expense in having to defend the 1997 Suit, thereby causing him to suffer loss and damage.

H

Reliefs sought by the plaintiff in the proposed proceedings

Amongst the reliefs sought by the plaintiff as set out in the draft writ of summons and statement of claim annexed as 'A' to the plaintiff's I application are as follows:

(1) a declaration that the defendants have acted in breach of their duties as receivers and managers of the said Estates;

(2) an order that the defendants re-transfer the Ayer Itam Estate in favour of Choong Lye Hock Estates Sdn Bhd or alternatively, in favour of the beneficiaries in accordance with their respective undivided shares therein;

(3) an order for the holding of an inquiry into the damage and losses suffered by the said Estates;

(4) an order that the defendants personally pay damages into court to the account of all the beneficiaries of the said Estates in accordance with their beneficial interests therein; and

(5) an order that the defendants personally pay damages to the plaintiff, including the legal costs and expenses incurred in defending the proceedings in the 1997 Suit.

The defendants' preliminary objection

On 15 July 2002, when the application came up for hearing before me, Mr Ramsun Ho, learned counsel for the defendants, raised a preliminary objection which has been expressly set out in para 4 of the defendants' affidavit in reply (encl 6) and prayed for the application to be struck out with costs. He relied on the old English case of *Re Maidstone Palace of Varieties, Limited; Blair v Maidstone Palace of Varieties, Limited* [1909] 2 Ch 283 which was followed by Anuar J (as his Lordship then was) in *Lee Choo Yam Holdings Sdn Bhd & Ors v Khoo Yoke Wah & Ors (Tai Kwong Goldsmith & Jewellers (under receivership); Saheran & Woon & Ors, Interveners)* [1993] 3 MLJ 615 and the Supreme Court case of *Tai Kwong Goldsmiths & Jewellers (under receivership) v Yap Kooi Hee & Ors* [1995] 1 MLJ 1, in support of his preliminary objection.

The main thrust of his preliminary objection is that the plaintiff's application should be struck out on the ground that the defendants, being officers of the court, are answerable only to the court which appointed them in the first place. He says that this court cannot hear the plaintiff's application because the application for leave should be filed vide a summons in chambers in the receivership proceedings, instead of by way of an originating summons in a fresh proceeding as the defendants were appointed as receivers and managers by the court in the original suit which has not yet been discontinued and, alternatively, that the plaintiff should apply to have the defendants discharged as receivers and managers in the original suit first before applying for leave to institute proceedings against the defendants in a fresh proceeding.

In response, Dato' N Chandran, learned counsel for the plaintiff, submitted that there is no substance or merit in the defendants' preliminary objection which must fail *in limine* because firstly, it is not possible for this application of the plaintiff to have been filed in the original suit as the defendants have in their own affidavit in reply (encl 6) at para 11 stated that the original suit has already been discontinued with the leave of the court on 7 September 1991 and, therefore, the court in the original suit has become functus officio. He relied on the decision of Siti Norma Yaakob J

(now FCJ) in the case of *Datuk Hussain bin Mohamed v First Malaysia Finance Bhd (Bank Negara Malaysia, Intervener)* [1990] 1 MLJ 369 in support of his submission.

Secondly, the plaintiff is quite happy for the defendants to remain as receivers and managers in the original suit provided they carry out their duties properly. Thirdly, the defendants could themselves apply to be discharged as receivers and managers if the plaintiff in the original suit did not do so. Fourthly, there can be no question of any miscarriage of justice if this court were to hear the plaintiff's application for leave to commence proceedings against the defendants for not doing their job properly because this court is the High Court. Fifthly, the preliminary objection being a technical objection should be dismissed by virtue of the new amendment to the RHC which comes into operation on 16 May 2002 because this court should look into the interests of justice instead of at the technicalities.

He sought to distinguish *Tai Kwong Goldsmiths* on the ground that the Supreme Court in that case only held that the leave of the court is required to institute garnishee proceedings against receivers and that it did not go further to hold that the leave must be obtained from the court which appointed the receivers. He also sought to distinguish the English case of *Searle v Choat* (1884) 25 Ch D 723 on the ground that in that case the plaintiff had brought an action against the receiver without the leave of the court whereas in the instant case the plaintiff is applying for leave before bringing an action against the receivers.

In response, Mr Ramsun Ho submitted that first the discontinuance of the original suit by the plaintiffs against the defendants in the original suit does not operate against the defendants in this proceedings because the defendants in this proceeding have not yet been discharged as receivers and managers in the original suit. Secondly, the amendment of 2002 to the RHC has no bearing on the substantive law because it regulates only procedure. Thirdly, based on the merits of the application, the plaintiff has not shown a strong prima facie case against the defendants in this proceedings on the following grounds:

(1) the duties imposed on the defendants as receivers and managers by the court in the original suit are not to prevent fraud or theft of property;

(2) since the receivers and managers are not the registered proprietors of the land they cannot prevent the registration of the charge and the plaintiff has also benefited from the transfer of the land to the plaintiff;

(3) the two court orders dated 1 March 1985 and 8 March 1985, respectively, do not require the receivers and managers to take possession of all the title deeds;

(4) the receivers and managers were unable to settle the quit rents of the said lands because the said Estates had insufficient funds and all the parties were aware of this including the plaintiff; and

(5) an advertisement was placed in the newspapers to this effect.

In view of the time constraint, the hearing was adjourned to 29 July 2002.

On 26 July 2002, the defendants filed a further affidavit in reply (encl 8) affirmed on the same date by the second defendant. A

On 29 July 2002, when the matter came up for continued hearing, Dato' N Chandran informed the court that the defendants had served a copy of the defendants' further affidavit in reply (encl 8) on Ms Christina Siew. He objected to encl 8 on the ground that it was not usual for an affidavit to be filed after the hearing had commenced. B

In response, Mr Ramsun Ho explained that the contents and nature of the affidavit needed to be considered because the first part of the affidavit concerned his preliminary objection and the second part of the affidavit concerned the merits of the plaintiff's application. He added that there was no new allegation of fact in the defendants' latest affidavit. C

Nevertheless, in view of the objection of Dato' N Chandran, the court rejected encl 8 which was filed without prior leave of the court.

Issue for the court's determination

The issue before this court is whether leave to institute proceedings against court appointed receivers and managers must be obtained from the court which originally appointed the receivers and managers or can the leave be obtained from any High Court? D

First order of the court E

The court upheld the preliminary objection of the defendants and struck out the plaintiff's application with costs to be borne by the plaintiff as the administrator of the estate of Chor Phaik Har, deceased. The court ruled that since the defendants were appointed as receivers and managers in the original suit, the plaintiff should apply vide a summons in chambers in the original suit for leave to institute the proposed proceedings against the defendants in their capacity as court appointed receivers and managers. My reasons for so deciding are as follows. F

Despite what was submitted by Dato' N Chandran, the learned counsel for the plaintiff, and what was stated in para 11 of the defendants' affidavit affirmed on 29 June 2002, encl 6, this court is of the respectful view that the original suit has not been discontinued. This is because although the order dated 7 July 1991 in that civil suit gave the plaintiffs in the original suit the liberty to discontinue the proceedings, from the available evidence as contained in the respective affidavits of both parties in these proceedings at encll 1, 6 and 7 the plaintiffs have not exercised that liberty since the affidavits do not show that all the orders contained therein have been complied with and that subsequent to that order the plaintiffs in the original suit have filed a notice of discontinuance of that civil suit and that the original suit was, accordingly, struck out. G H

This court is therefore of the respectful view that the original suit is still pending. The court further notes that these proceedings are in the nature of a leave application and concern alleged acts, omissions and misconduct of the defendants as receivers and managers and the circumstances I

surrounding their appointment and the duties imposed upon them by the court in the original suit. In the light of that, the argument that the court is functus officio in the original suit has no merits. In view of the nature of the allegations which have been levelled against the receivers in the draft writ of summons and statement of claim, this court is further of the respectful view that the plaintiffs and the other defendants in the original suit should be joined as parties in the leave application in order to avoid multiplicity of proceedings.

The latest amendment to the RHC vide PU(A) 197 with effect from 16 May 2002 is inapplicable because the non-compliance complained of here is non-compliance of a principle of substantive law designed for the protection of court appointed officers such as the defendants in these proceedings and not merely a rule of court.

In my judgment, although the Supreme Court in *Tai Kwong Goldsmiths* did not, when reiterating in very clear and explicit terms the general principle of law that proceedings may not be instituted against a court appointed receiver without the leave of the court, hold that the leave should be obtained in the court which appointed the receiver and not in just any High Court, that part of the judgment of Anuar J which followed *Re Maidstone Palace of Varieties, Limited* and *Re Potter, ex p Day* (1883) 48 LT 912 and which held that the leave should be applied for and obtained from the original court appointing the receiver because it is only proper that the court originally appointing the said receivers should be the proper forum to give direction, supervise or discipline if necessary and decide any issue pertaining to the conduct of its own officers, was not overruled by the Supreme Court.

By not doing so, this court is of the considered view that the following excerpt taken from the decision of Neville J in *Re Maidstone Palace of Varieties, Limited* at p 286 and reproduced and applied by Anuar J in *Lee Choo Yam,* at p 624, is still good law:

> It appears to me that a dispute of that kind is one which ... the court will deal with itself, and that it will not allow its officer to be subject to an action in another court with reference to his conduct in the discharge of the duties of his office, whether right or wrong. The proper remedy for any one aggrieved by his conduct is to apply to this court in the action in which he was appointed. If any wrong has been done by the officer, the court will no doubt see that justice is done, but no one has a right to sue such an officer in another court without the sanction of this court.

In my judgment, the reason why the Supreme Court did not so hold is because it was unnecessary to do so as the issue did not arise for its determination since the facts of the case show that it was Dato' Rohailan bin Mohamed, the court appointed receiver of the dissolved firm, Tai Kwong Goldsmiths & Jewelers who had applied to the same court which had appointed him on 6 March 1990 by way of summons for directions with regard to the question of the priority of payments between the second intervener and 16 others as depositors of money with Tai Kwong and the former employees of the dissolved firm.

The first intervener, Messrs Saheran & Woon was the garnishee holding a sum of RM1,144,482.10 as stakeholders for the receiver in three lower court garnishee proceedings taken out by the second intervener with two others. The second intervener and the 16 others are the depositors.

The receiver's complaints were that the second intervener had obtained, despite arguments by the receiver for a stay, a garnishee order absolute against the bank account of the dissolved firm in part settlement of the second intervener's judgment sum, had proceeded to garnish for the balance settlement out of the stakeholder's sum held by the first intervener and proceeded further to execute the garnishee order absolute by way of writ of seizure and sale against the first intervener when payment on demand was not forthcoming.

Anuar J held that it is only where the conduct or misconduct of the receiver is being put into question in any court of law by a claimant against the receiver personally or in the manner of his conduct in discharging his duties that leave of court must be obtained. He also held that leave of the original court appointing the receivers is required because it is only proper that as the court originally appointing the said receivers, it should be the proper forum to give direction, supervise or discipline if necessary and decide on any issues pertaining to the conduct of its own officers. He further held that it is a wrong presumption of law to say that before any proceeding is taken out against a court appointed receiver, leave of the original court appointing him must first be obtained because whether leave is or is not required will depend on the merits of each case.

The relevant excerpt of the judgment of the Supreme Court in *Tai Kwong Goldsmiths* which was delivered by VC George J (as his Lordship then was) appears on pp 9–10 and is reproduced below for its full force and effect:

> We would, accordingly and with respect, disagree with the learned judge's suggestion that *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233 does not apply and would reiterate that there is a general principle of wide application that interference with persons having duties to perform in or at the instance of a court of justice amounts to contempt of court. And stemming from that principle, we lay down, in the context of the issues raised in this appeal, that the court will not permit a receiver appointed by its authority and who is therefore its officer, to be interfered with without leave. In elaboration (but without retrogating the effect of the rule) we further lay down that nobody can bring any action or proceedings against a receiver, in his capacity as such, including execution proceedings which include garnishee proceedings, whether the misconduct of the receiver is in issue or not, without the leave of the court and if such an action or proceeding is brought without leave, its further prosecution will be restrained.
>
> In our judgment, each of those three garnishee orders having been obtained without leave were improperly obtained and in proceeding to obtain them and in obtaining them, the appellants were in effect in contempt of the court that appointed the receiver. The garnishee orders and each of them are of no effect. If there had been any amounts paid to the garnishors pursuant to the garnishee order such amounts should be forthwith repaid to the receiver.

My view is fortified by the following excerpt from the judgment of Gunn Chit Tuan SCJ in delivering the judgment of the Supreme Court in *Zainal Abidin Putih & Anor v Che Wan Development Sdn Bhd* [1992] 2 MLJ 233, at p 241:

> *We would start off by pointing out that the appellants were appointed receivers by the court and are therefore first and foremost officers of the court, and to use the words of Viscount Haldane LC in William H Parsons & Ors v The Sovereign Bank of Canada* [[1913] AC 160] '*put in to discharge certain duties prescribed by the order appointing him*'. In the present case, the appellants were appointed by the High Court under sub-para (c) of para (1) of reg 9 of the Essential (Protection of Depositors) Regulations 1986, which reads as follows:
>
> > '... to manage the affairs and property of the deposit-taker and for such incidental or ancillary orders or directions in relation to such appointment as may, in the opinion of the Central Bank, be necessary or expedient;'
>
> The deposit-taker in this case, ie the Co-operative Central Bank Bhd, remains in existence but has lost its title to control its assets and affairs. As the appellants were appointed by the court and are responsible to it and cannot obey the directions of the parties in the action, they do not stand in the position of agents to the parties who are interested at the suit of whom they are appointed (*Corporation of Bacup v Smith* [(1890) 44 Ch D 395] at p 398 per Chitty J). But the important point in this case was that as the appellants are officers of the court, leave of the court should have been obtained to proceed against them in the second originating summons and the case of *Re Maidstone Palace of Varieties Limited* [[1909] 2 Ch 283] was correctly cited by counsel for the appellants in support of his submission that leave of the court was necessary. Unfortunately the preliminary objection of counsel in the lower court was overruled by the learned judge for if his Lordship had upheld that preliminary objection, then the further prosecution of the second originating summons should have been restrained and dismissed with costs if leave was not obtained. (Emphasis added.)

In my judgment, despite having heard arguments on the merits of the leave application, this court is precluded from going into the merits of the leave application at this stage since the obtaining of leave is a condition precedent to the commencement of proceedings against the defendants. The issue on merits can only be addressed by the court which has the jurisdiction to grant the leave in the first place.

The plaintiff's second application for review

Subsequent to the granting of the above order by this court on 29 July 2002 ('the first order') in respect of the plaintiff's application (encl 2), the plaintiff filed on 8 August 2002 another application vide summons in chambers (encl 10) ('the second application') together with a certificate of urgency (encl 11) and supported by his two affidavits affirmed and filed on 8 August 2002 (encl 9) and 9 August 2002 (encl 13) respectively, and the affidavit of Hoe Kek Pin, an advocate and solicitor, affirmed on 2 August 2002 and filed on 9 August 2002 (encl 14).

The 1995 order

In the second application, the plaintiff sought the review and/or variation by this court of the first order on the ground that the first order had not yet been drawn up and perfected and that this court would have decided the first application differently if the plaintiff had brought to the attention of this court an oral decision of Selventhiranathan J, delivered on 19 April 1995 that the original suit had effectively been discontinued pursuant to the order of court dated 7 September 1991 ('the 1991 order'). Consequently, his Lordship dismissed an application of the plaintiffs in the original suit with costs ('the 1995 order').

The oral decision and the 1995 order were in respect of an application vide summons in chambers filed on 24 February 1995 by the plaintiffs in the original suit to stay all proceedings pertaining to the assessment of damages and taxation of costs as well as all execution proceedings in relation to costs and damages in favour of the third defendant (who is the plaintiff in these proceedings) pending the final determination of the original suit.

The plaintiffs in the original suit had argued before Selventhiranathan J that the original suit was still pending because although the plaintiffs were granted liberty to discontinue the suit, the plaintiffs had not taken further steps to discontinue the original suit. The third defendant (who is the plaintiff in these proceedings) had opposed the application on the ground that the original suit had been effectively discontinued.

Dissatisfied with the oral decision and the 1995 order of Selventhiranathan J, the plaintiffs in the original suit filed a notice of motion for leave to appeal to the Court of Appeal. However, when the notice of motion came up for hearing on 31 July 1995, it was withdrawn by the plaintiffs and the costs awarded to the third defendant in the original suit was taxed against the plaintiffs.

The plaintiff informed this court that the above matters were not brought to the attention of this court earlier because he was not aware of the same then. He also informed this court as follows in para 6 of his affidavit:

> In fact, I am not fully aware of the various applications and decisions made under Civil Suit No 315 of 1983 prior to my appointment as administrator of the estate of Chor Phaik Har, deceased, in October 1998 as it has always been my late mother, the said Chor Phaik Har, who gave instruction pertaining to the conduct of the said proceedings directly to her solicitors, Messrs Lim Cheng Poh, Lim & Rahim.

The plaintiff also states that he is applying for leave in a fresh proceedings because of the animosity of the plaintiffs in the original suit against him.

The defendants, in their affidavit in reply (encl 15) affirmed on 23 August 2002 by the second defendant and filed on the same date, objected to the plaintiff's second application on the ground, inter alia, that the application in which the 1995 order was made did not involve all the other parties to the original suit, namely, the first and second defendants.

A The receivers and managers were also not involved. Therefore, the receivers and managers, being non-parties to the 1995 order, were not bound by it.

In the plaintiff's affidavit in reply (encl 18) affirmed on 3 September 2002 and filed on the same date, the plaintiff has reiterated that he cannot file his application for leave to institute proceedings against the receivers B and managers in the original suit because the original suit has been effectively discontinued by the 1991 order and the real risk that the plaintiffs in the original suit would oppose any application for leave to institute proceedings against the receivers and managers because of their animosity towards him.

C *The defendant's preliminary objection*

Mr Ramsun Ho, learned counsel for the defendants, raised a preliminary objection. He relied on the decision of the Court of Appeal in *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 and submitted that the court's discretion to review, reverse, and/or recall an earlier order D or decision before it is perfected is limited to cases where the court plainly lacked the jurisdiction to make the order or decision. In any event, the fresh evidence sought to be admitted by the plaintiff does not warrant a review and/or variation of the first order.

In cases where the plaintiff is relying on the admissibility of fresh E evidence to seek a variation of an earlier order, the proper procedure is for the plaintiff to file an appeal. He relied on the case of *Re Barrel Enterprises & Ors* [1972] 3 All ER 631.

Miss Christina Siew, learned counsel for the plaintiff, submitted that if the court had had the benefit of the oral decision of Selventhiranathan J, the F court may have decided the plaintiff's first application (encl 2) differently. She relied on the case of *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286 at p 293 in support of her contention that the prime consideration should be the justice of the case and where it is necessary for the court to do justice to the case the court should be at liberty to re-open the case. She also relied on the cases of *William Jacks & G Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd & Anor* [1991] 2 MLJ 555 and *Tsoi Ping Kwan v Loh Lai Ngoh & Anor* [1997] 3 MLJ 165 which held that where there has been no trial or hearing on the merits, the *Ladd v Marshall* [1954] 3 All ER 745 conditions governing the admission of fresh evidence do not apply, and the case of *In The Marriage of R T & B J Blamey* (1994) 18 Fam LR 481 which held that the court can exercise its discretion to H review an earlier order in order to achieve public interest in the finality of litigation and to avoid expense and anxiety to the litigants.

Miss Christina Siew also submitted that the receivers and managers are the authors of their own misfortune because they should have applied to discharge themselves when the plaintiff did not do so after the original suit I was discontinued.

In reply, Mr Ramsun Ho submitted that even if the court had had the benefit of Selventhiranathan J's decision, the court would not have arrived

at a different conclusion because the 1995 order did not have the effect of discontinuing the original suit against the receivers and managers who were not parties to the proceedings before the learned judge.

According to Mr Ramsun Ho, the defendants would like the other parties in the original suit to be heard in respect of the allegations by the plaintiff against the defendants who are the court appointed receivers and managers. By not filing their application for leave in the original action, injustice and prejudice would be caused to the defendants.

Second order of the court

Having heard and considered the submissions of both learned counsel, the court dismissed the plaintiff's second application (encl 10) with costs.

My reasons for doing so are as follows.

Firstly, the court dismissed the preliminary objection of the defendants because the court agreed with Ms Christina Siew based on the authority of the decision of the Federal Court in *Seong Fatt Sawmills* which had followed the decision in the English case of *Re Harrison's Share Under a Settlement* [1955] 1 Ch 260 instead of the decision in another English case, ie the *Re Barrel Enterprises & Ors*, and the decision of the Supreme Court in *William Jacks* that where it is necessary and the justice of the case requires, the court has the discretion, to be exercised judicially and not capriciously, to review and/or vary the first order which has not been perfected to do justice to the case by ensuring that there is finality to litigation.

Secondly, having considered the second application on its merits, this court is of the respectful view that even if the oral decision of Selventhiranathan J, which led to his Lordship making the 1995 order, had been made known to the court prior to 29 July 2002, this court would still have dismissed the plaintiff's first application because it is a matter of interpretation of the 1991 order whether the original suit has been discontinued for the purposes of these proceedings. In my respectful view, the original suit is still pending because it has not been struck out. The plaintiff has also admitted in his affidavit that there are several outstanding matters in the original suit which have yet to be resolved. The receivers and managers have also not been discharged. Nevertheless, even assuming my interpretation of the 1991 order is erroneous and the original suit has in fact been effectively discontinued, the strict rule requiring the obtaining of leave in the original court which appointed the defendants as receivers and managers before proceedings can be instituted against them is still applicable as shown in the decided cases referred to and followed in the first part of this judgment. It follows, therefore, that the plaintiff's first application not having been made to the court which originally appointed the defendants as receivers and managers had been correctly dismissed with costs by this court on 29 July 2002.

Thirdly, the rationale for such a strict rule which has been very clearly stated in the decided cases referred to and followed in the first part of this judgment is also applicable to the facts of the instant case. Had the first

application been made in the original suit, a search of the court file by the plaintiff, which by the plaintiff's own admission in para 7 of his affidavit in reply (encl 18) contains about well over 600 enclosures and that it is therefore impossible for him to be fully appraised of each and every application filed in the original suit, would have led to the discovery of the 1995 order and, consequently, avoided the additional cost and expense incurred by the estate of Chor Phaik Har, deceased, in filing the second application. In my judgment, it would cause serious prejudice and injustice to the defendants who are the receivers and managers appointed by the court in the original suit to discharge specific duties prescribed by the 1985 and 1991 orders if they have to be put to considerable cost and expense just because the plaintiff has chosen to obtain leave of the court which is a court different from the one which originally appointed them. The suggestion of the plaintiff in para 10 of encl 18 that this court can always call for the court file of the original suit if the defendants are concerned that documents filed in the original suit are not brought to the attention of this court for this court's consideration is not only impracticable but it also defeats the purpose and object of the strict rule in the first place. The plaintiff's allegation of the animosity of the first and second defendants in the original suit towards him, even if true, is no justification for this court not to apply the strict rule which is clearly intended for the protection of court appointed receivers and managers.

Application dismissed.

Reported by Peter Ling